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OFFICE OF GENERAL
COUNSEL

BEFORE THE FEDERAL ELECTION COMMISSION

In the matter of)
)
Citizens for Cochran) **MUR 6840**
And John M. Robinson, as Treasurer)

RESPONSE OF CITIZENS FOR COCHRAN TO THE COMPLAINT

This responds on behalf of our clients, Citizens for Cochran and John M. Robinson, as Treasurer (collectively "Campaign"), to the notification from the Federal Election Commission ("Commission") that a complaint and supplemental complaint (collectively "Complaint") was filed against them in the above-captioned matter. The complaint, filed by a political opponent of the Campaign, does not contain any factual allegations against the Campaign, misstates the law, and then fails to provide any evidence at all to support its erroneous legal theories. For the reasons set forth below, the Commission should dismiss the Complaint against the Campaign, close the file and take no further action.

The pertinent allegations in the Complaint focus on alleged reporting and disclaimer violations by an independent expenditure group called All Citizens for Mississippi ("ACM"), not the Campaign. The only reference to the Campaign states that a photograph ACM used in a newspaper advertisement is the same as one that appears "on the biography page of the Cochran for Senate website." Compl. at 2. The Complaint does not allege that anyone from the campaign was involved in creating the ACM advertisement discussed in the Complaint. Other than this brief reference and the breathless misguided allegation that the use of the publicly available photograph may constitute republication of campaign materials, the Complaint is utterly devoid of any factual or legal allegations whatsoever concerning the campaign. Accordingly, the Commission must find no reason to believe and dismiss the complaint against the Campaign.

Under the Federal Election Campaign Act of 1971, as amended (the "Act"), any group or individual who finances the "the dissemination, distribution, or republication, in whole or in part, of any broadcast or any written, graphic or other form of campaign materials prepared by the candidate, his campaign committee, or their authorized agents shall be considered to [have made an] expenditure." 2 U.S.C. § 441a(a)(7)(B)(iii). Commission regulations, however, do not track the language of the statute and provide that the individual or group financing the republication of campaign materials shall be considered to have made a contribution. 11 C.F.R. § 109.23(a). The candidate who prepared the materials does not receive or accept an in-kind contribution unless the communication satisfies the content and conduct prongs under the Commission's coordination rules at 11 C.F.R. § 109.21. *Id.* Commission regulations also contain a list of exceptions to 11 C.F.R. § 109.23(a) including, *inter alia*, the fourth exception which applies if the campaign material used consists of a brief quote that demonstrates a candidate's position as part of a person's expression of his or her own views. *Id.* § 109.23(b)(4). "This provision appears to contemplate exempting from regulation the incidental use of campaign materials to further one's own independent communication." MUR 5743 (Betty Sutton for Congress / EMILY's List), Statement of Reasons of Commissioners Ellen L. Weintraub & Hans A. von Spakovsky at 3.

Against this regulatory backdrop, a majority of the Commission has already ruled that the use of a candidate photograph does not convert independent speech into a contribution as erroneously alleged by the Complainants. *See, e.g.*, MUR 5743 (Betty Sutton for Congress/EMILY'S List) (Commission dismissed matter where respondent used candidate photographs obtained from candidate's website in mail pieces); MUR 5996 (Education Finance Reform Group/Tim Bee) (dismissing matter where respondent used pictures of candidate

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obtained from candidate's website). As Commissioners Weintraub and von Spakovsky stated in their MUR 5743 Statement of Reasons: "[W]here a standard photograph from a website is reproduced, but only as an incidental portion of the document disseminated, we do not think a finding that the entire document is a republication of campaign materials is warranted." MUR 5743, Statement of Reasons of Commissioners Ellen L. Weintraub & Hans A. von Spakovsky at 4; *see also* MUR 5996, Statement of Reasons of Commissioners Matthew S. Petersen, Caroline C. Hunter, & Donald F. McGahn at 3 ("[t]he download of a candidate's photograph from his or her publicly available website, absent some additional content or message, is not enough to constitute republication of campaign materials.").

In the instant matter, the Complaint's only allegation against the Campaign is that an independent expenditure group used a photograph of Senator Thad Cochran that also appears on the publicly available biography page of the Campaign's website. The reasoning and conclusions in MURs 5743 and 5996 makes a finding of no reason to believe inevitable here.¹ The mere use of a photograph that is publicly available on a campaign's website does not support a coordination allegation. Accordingly, the Commission must dismiss the Complaint against the Campaign, take no further action, and close the file.

¹ When the Commission has not proceeded against a respondent previously, it should not proceed against similarly situated respondents in the future unless the public has notice through a rulemaking. MUR 5564 (Alaska Democratic Party), Statement of Reasons of Commissioners David M. Mason and Hans A. von Spakovsky at 2-3, 10; *see also* *FCC v. Fox Television Stations, Inc.*, 132 S. Ct. 2307, 2315-16 (2012) ("In the context of a change in policy . . . an agency, in the ordinary course, should acknowledge that it is in fact changing its position and 'show that there are good reasons for its new policy.'" (quoting *FCC v. Fox Television Stations*, 556 U.S. 502, 515 (2009))); *CBS v. FCC*, 535 F.3d 167 (3d Cir. 2008) (an agency cannot, in an enforcement action, substantially deviate from prior enforcement policies without sufficient notice of change in policy).

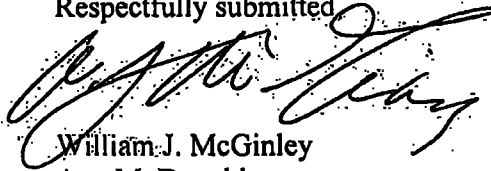
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The Commission has already made clear that simple speculation by a complainant is insufficient, and that when a complaint fails to carry its burden and does not establish that there is reason to believe that a violation of the Act has occurred, the matter must be dismissed. Similarly, the Commission has held that the burden does not shift to a respondent in an enforcement action merely because a complaint has been filed and accusations made, especially such as here where the complaint fails to allege facts that constitute a violation under the Act or Commission regulations. *See* MUR 4850 (Deloitte & Touche, LLP, *et al.*), Statement of Reasons of Commissioners Darryl R. Wold, David M. Mason, and Scott E. Thomas at 2 (“The burden of proof does not shift to a respondent merely because a complaint is filed.”).

Moreover, a reason to believe finding is warranted only if a complaint sets forth specific credible facts, which if true, would constitute a violation of the Act. *See* MUR 6554 (Friends of Weiner), Factual & Legal Analysis at 5 (“The Complaint and other available information in the record do not provide information sufficient to establish [a violation].”). Here, the Complainants have failed to allege such specific credible facts. Critically, the Commission has already made clear that unwarranted legal conclusions from asserted facts, or mere speculation, will not be accepted as true and cannot support a finding of reason to believe. *See* MUR 4960 (Hillary Rodham Clinton for US Senate Exploratory Committee, Inc.), Statement of Reasons of Commissioners David M. Mason, Karl J. Sandstrom, Bradley A. Smith and Scott E. Thomas at 2 (“Unwarranted legal conclusions from asserted facts will not be accepted as true.” (internal citations omitted)); MUR 4869 (American Postal Workers Union), Statement of Reasons of Chairman Darryl R. Wold, Vice Chairman Danny L. McDonald, and Commissioners David M. Mason, Karl J. Sandstrom and Scott E. Thomas at 2 (complaint failed to alleged violation of the Act).

For all of the reasons stated above, there is no factual or legal basis for finding reason to believe a violation was committed by the Campaign. Accordingly, we respectfully request that the Commission dismiss the Complaint against the Campaign, close the file and take no further action.

Respectfully submitted



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